Citizen Action

☑ 1730 Rhode Island Avenue, Suite 403
Washington. DC 20036
(202) 775-1580 • (202) 296-4054 FAX

2608 Green Bay Road
Evanston, IL 60201
(647) 332-1776 • (647) 332-1780 FAX

TESTIMONY BEFORE the HOUSE COMMERCE SUBCOMMITTEE on TELECOMMUNICATIONS, TRADE, AND CONSUMER PROTECTION on CONTINGENCY FEES IN PRODUCT LIABILITY CASES

on behalf of Citizen Action

Richard Vuemick
Citizen Action
April 30, 1997

Good morning Mr. Chairman and members of the Committee. I am Richard Vuernick, legal policy director of Citizen Action. On behalf of our two million members in 31 states, I want tothankyouforheopportunitytoteatifytoday.

I am here today to share our members' experiences with contingency fee arrangements between attorneys and their clients. Such arrangements provide access to our nation's court system and have allowed ordinary Americans -- regardless of their wealth or social standing -- to hold even the most powerful wrongdoer accountable for harm caused by defective products.

Our civil justice system, the envy of the world, puts consumer health and safety in the hands of the people, not the government or powerful corporations. Unless we want to institute widespread govemment-paid legal aid programs, the contingency fee arrangement is necessary. Simply stated, the contingency fee agreement is the poor and middle income person's ticket to justice.

As part of my testimony, I have included an op-ed which appeared in The New York Times on March 7, 1995. It describes a case in Wobum, Massachusetts, regarding major corporations found to be dumping toxic substances into the two public wells that supplied drinking water for the area. Thirteen of the children in the area, more than tight times the national average, were stricken with leukemia. Eight families sued the corporations. During the jury's deliberations, one of the plaintiffs' lawyers said, "This could only happen in America. Nowhere else- in the world can eight families hold two of the nation's most powerful corporations accountable." Notably, after discussions between several of the plaintiffs and their attorney, the attorneys' fees were reduced.

Contingency Caps Limit Consumer Access to the Courts

Proposals to limit contingency fees -- either by a percentage cap or a sliding scale system -- on the surface may sound as if they are more favorable to consumers. The argument is simple: the injured person is better protected if he or she is assured a greater percentage of the award.

The argument may be simple, but it is wrong. Injured consumers know a simple mathematical equation: 100% of nothing is nothing. Proposals which seek to give injured consumers a greater share of their compensation but then make it far more difficult to obtain compensation should not be viewed as proconsumer.

Citizen Action is concerned that limits on contingency fees could have two adverse consequences for consumers. Fit, it may make it more difficult for consumers to find counsel. Complicated product liability cases or cases against defendants with stables of defense attorneys will require a great deal of investment by plaintiff attorneys, money which is not always recouped. One-sided limits on attorneys fees will make it less likely tbat injured consumers will be able to find attorneys willing to take on those cases.

Second, it will decrease consumer access to quality counsel. Simply having an attorney is not a sufficient guarantee. No injured consumer -- regardless of income -- should be denied access to the best counsel available. One-sided caps on attorneys fees would provide incentives for attorneys to limit their efforts on behalf of their clients in instances where their compensation could be expected to be less than their costs.

Costs of Investigating and Preparing A Case

In many instances, taking on a large corporation for injuries sustained includes undertaking a complex fact-finding investigation into corporate practices and/or accepted medical standards. These investigations and the subsequent case preparation are often necessary to reveal harmful

practices or reckless inattention to detail. As a result, many of a plaintiffs big expenses come at the beginning of the litigation process. Most plaintiffs do not have the resources to pay those large fees prior to receiving a recovery. Attorneys finance those investigations and preparations with the understanding that they will receive a portion of any judgment or settlement.

Steven Sharp is an excellent example of an ordinary citizen holding a large institution accountable for their actions. Steven Sharp was 17 years old in 1992 when the J.I. Case diesel tractor's baler from which he was clearing hay suddenly and without warning self-started, pulled him into the baler and cut off both of his arms. The jury, which heard the case. in a courtroom five blocks from J.I. Case's headquarters, took its responsibilities in this case with the utmost seriousness and determined that the young man was partly to blame for his injuries. Accordingly it reduced the $6.5 million compensatory award to $4.3 million and assessed punitive damages in the amount of $2 million against J.I. Case. After a lengthy discovery process, Steven Sharp's lawyer found that two previous tragedies were a direct result of this same design defect. One victim had his right arm mangled seven years earlier and another victim was decapitated by the machine just hvo years before.

The worst part of these tragedies is that lawyers for Steven Sharp discovered they were preventable. J.I. Case could have made the hay baler safe if a 70 cent part had been included in the original manufacture of each machine.

These are the types of investigations and cases which can only be- brought because the plaintiff does not have to fund important, fact-finding, preliminary, investigative activities up front. In the Woburn case described above, the plaintiff-breadwinners consisted of a nurse, a truck driver, a utility company employee and a sheet metal worker -- plaintiffs who were not wealthy enough to pay for complicated environmental studies and tests.

Contingency Fee Arrangements Screen Out Non-Meritorious Cases

Contingency fee arrangements have the effect of screening out cases which may not be meritorious. Contingency fee arrangements force attorneys to allocate their resources judicously. If the attorney is working for a percentage of the plaintiffs' recovery, there is no incentive for the attorney to take a case with little or no merit. In those instances, the attorney would either receive no payment or a small amount which may not cover the costs of bringing the litigation. Contingent fee attorneys carefully screen out cases and decide which cases are worthy of their time and attention. The same cannot be said of hourly fee arrangements which provide no incentive to screen out cases or work efficiently.

One-Sided Limits

Proposals to limit contingency fee agreements are unfair because they only affect consumers and their attorneys. Limiting contingency fee agreements without limiting the amount of money that corporations can spend on their defense is one-sided. Businesses will still be able to hire the best legal defense that their money can buy, but if limits are placed on contingency fee agreements, consumers may be limited in their choice of counsel.

Proposals which limit contingency fees affect only consumers injured by defective or dangerous products. Businesses sued by consumers would not be affected nor would businesses which sue other businesses because they do *not* rely as heavily on contingency fee agreements as consumers do.

Additionally, limiting attorneys contingency fees will not in any way reduce health care or product liability costs. Even if an attorney represented a victim for free, the negligent doctor would

still have to pay the same award. The costs to the system would be the same as if the attorney received a percentage of the award.

Limits On Fees Does Not Mean A Reduction of Cases

There are no documented benefits either to the legal system or to consumers of legal services when limits are placed on contingency fees. For instance, the American Medical Association's own Special Task Force on Professional Liability and Insurance concluded: "Regulating [contingent fees] may not reduce the number or severity of suits." Similarly, the Washington State Supreme Court's Novack Commission stated that contingency fees do not encourage frivolous suits. The best way of dealing with frivolous suits the Commission stated, is to utilize rules which provide for attorneys fees to the prevailing party if a claim or defense is asserted frivolously.

Broken Attorney-Client Relationships

Having stated the above, I will also say that there are aspects of the attorney-client relationship which may be in need of repair. Are there attorneys out there who may not be accurately disclosing their fees? Certainly. Are there attorneys out there who take on more cases than they can handle effectively? Sure. But are these reasons to change the entire system by limiting or eliminating contingency fees in product liability cases? Definitely not.

As a consumer group we are in favor of empowering consumers with better disclosure of fees and the fee structure and sanctioning attorneys who do not act in the best interests of their clients. We are also in favor of better explanation of bills and their contents. However, it is clearly not in consumers' interest to deal with these problems by undercutting the access to quality counsel

afforded through the contingency fee system. Again, the contingency fee is the door through which most consumers enter the legal system. It enables them to receive the benefits of high-quality counsel. It allows them to switch attorneys if they are unsatisfied with counsel. There are clearly other solutions to deal with bad lawyers rather than by blocking access to consumers.

The contingency fee system allows consumers who are dissatisfied with the quality of their legal representation the freedom to take their business elsewhere, a better and more pro-consumer safeguard. Additionally, members of a class action lawsuit who are not satisfied with their contingency fee arrangements can challenge the award. The societal benefit of allowing cases to be consolidated in a class action to utilize judicial resources efficiently, far outweighs any harm done by potentially inflated fees.

Conclusion

Unlike the political system, our nation's civil justice system allows ordinary Americans to hold large institutions accountable for their negligent and reckless actions. Contingency fee arrangements are an integral part of that system.

Contingency fee arrangements are necessary to promote equal justice. Without them, our civil justice system would be available only for the wealthy, who could afford to pay for the costs associated with the preparation and investigation of cases prior to receiving compensation fa their injuries.

That is why Citizen Action joins a list of recognized consumer groups who support contingency fee arrangements. They provide injured consumers with important access to our nation's courts.

THE NEW YORK TIMES A19
MARCH 7. 1995

Whose Court Is It, Anyway?

By Jonathan Harr

NORTHAMPTON, Mass. After four days of deliberation, the jury in the Woburn case had still not returned a verdict. Lawyers for the panics gathered outside the courtroom in the Federal District Court in Boston and paced the corridor. One of them, a Harvard Law School professor named Charles Nesson, marveled at the process unfolding inside. "This could only happen in America," he said. "Nowhere else in the world can eight families hold two of the nation's most powerful corporations accountable."

I, might no, be possible in America much longer. either. Yesterday the House of Representatives began debating a measure that would have a devastating effect on our system of civil justice By making it far more difficult to sue. the Common Sense Legal Reforms Act would severely limit the access of avenge citizens to the most democratic institution ever devised — a jury of one's peers.

The Wobum use began with the persistence of One mother. Anne Anderson, whose youngest son fell ill with leukemia in 1972. She discovered that a dozen more children in the neighborhood were also stricken with the disease (eight times the national average). Then, in 1979. tie two public wells that supplied drinking water to the area were found to be contaminated with highly toxic industrial solvents. Mrs. Anderson suspected a connection, but could get no answers from public health officials.

She and seven other families went to a successful young personal injury lawyer. Jan Schlichtmann. To his practiced eye. the use looked too complicated and expensive to prepare, and the families — whose breadwinners included a nurse, a truck driver. a utility employee and a sheet metal worker — no, wealthy enough to pay for it. But in the end. compelled by their story, he decided to take the case.

Mr. Schlichtmann says now that if the proposed reforms had cd&d he would never have considered it. The PC, contains several provisions to deter plaintiffs from filing lawsuits. but the most chilling would force the loser in most civil anions to pay the costs of the winner. including legal bills. Corporations can afford to take the risk, but for someone already suffering an injury or loss, the provision makes the act Of entering a courtroom more like a double-or-nothing bet at a poker table. Most have trouble paying their own legal hills, much less those of their opponents.

The eight Wobum families sued two corporations, W. R. Grace and Beatrice Foods, accusing them of polluting the East Wobom water supply and causing death and injury to their children. Mr. Schlichtmann spent nine years and almost $1 million of his own money on the case. The jury ultimately found W. R. Grace (but not Beatrice Foods) negligent for dumping toxic waste. The families got some money. and their legal challenge resulted in scientific research demonstrating a link between industrial pollution in tie water supply and human disease And W. R Grace acknowledged responsibility and is now helping to clean up the polluted aquifer.

The Woburn case is an example of the way the courts are supposed to work. The Republicans' bill would dismantle a system that isn't perfect, but one that gives both citizens and corporations their day in court. □

Jonathan Harr is *author of the* forthcoming *"A* Civil *Action," about the lawyers involved in the Woburn case.*

Ask these families about tort reform.